IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1029 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PH GOHEL

Versus

PORBANDAR MUNICIPALITY

Appearance:
MR AJ SHASTRI for Petitioner
Mr.Prashant Mankad for
MR YOGESH S LAKHANI for Respondent No. 1 and 2
Mr.A.J.Desai, learned A.G.P. for Respondent No. 3

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 21/03/2000

ORAL JUDGEMENT

1. The petitioner, namely, P.H.Gohel, claims to be a resident of Porbandar city in Shitla Chowk area which is near to Kirti Mandir and one Shitla Mata's Temple and

Veravali Mata's Temple. The petitioner has stated that in the vicinity of this area there is a maternity Hospital and in this area there are shops pertaining to household items. It is also the case of the petitioner that in this area one head strong person, namely, Kala Vasim Iqbal Ali Mukadam has opened a fish shop despite resistance from the residents of the area. It has been further stated by the petitioner that time and again request was made to stop the shop as it comes within the prohibited zone declared by the respondent -Municipality but the shop has not been stopped. The petitioner has made reference to Sec.221 of the Gujarat Municipalities Act and the bye-laws of the Porbandar Municipality and has submitted that it is the bounden duty of the Municipality to prohibit any person from doing any activity which is prohibited under the law and the bye-laws framed by the Municipality. It has been then stated that one I.P.S.Officer, namely, Kiran Bedi has visited Porbandar city and Kirti Mandir area and found that the sale of fish activity had polluted the entire area and she had filed a case before the Supreme Court. The copy of the Resolution passed by the Porbandar Municipality on 10.12.98 had been enclosed with the petition as Annexure 'C', whereby it was decided to remove the said fish shop and for filing the criminal prosecution. Said Kala Vasim Iqbal Ali Mukadam, who is alleged to have opened the said shop, has not been impleaded as a party. However, with the averments, as aforesaid, this Special Civil Application dt.2.2.99 was filed in this court on 8.2.99 with the main prayers as under:-

"(A) This Hon'ble Court be pleased to pass an appropriate writ of mandamus and/or any other appropriate writ, order or direction, directing the respondent authorities to forthwith close down the fish shop situated in Shitla Chowk area belonging to one Kala Vasim Iqbal Ali Mukadam and any other fishshop, if opened up by any person by implementing the resolution dated 10.12.1998, Annexure-C to this petition.

(B) Be pleased to issue an appropriate writ, order or direction, directing the respondent authorities to see that in the nearby vicinity of the area no such fish shop even in future shall be allowed to be opened by the respondent authorities."

2. On 12.2.99 the petition was admitted and the Rule was made returnable on 12.4.99.

3. Affidavit-in-reply dated 10.5.99 has been filed under the signatures of one Manharlal Dwarkadas Vithalani, Chief Officer of Porbandar Nagar Palika respondent No.2. In Para 2 of this affidavit in reply it has been stated that, it is true that there is maternity hospital near "Shitla Chowk" but petitioner has not revealed the real fact before this Hon'ble Court that the petitioner himself is the owner of the said maternity hospital and for that reason only the petitioner is the interested party, who wants to get the said fish sop closed which belongs to Kalu Vasim Iqbal Ali Mukadam. While several objections have been raised opposing this petition through the affidavit in reply dt.10.5.99, I find it appropriate to quote the contents of para 6 and 8 of this affidavit in reply as under:-

"6. Para 6 is also repetition of averments by petitioner. In reply of para 7 of the petition, I want to put one real and correct fact before the Hon'ble Court. Due to respondent's notice dtd.1.1.1999 to fish shop holder to close down his fish packing activity, the above said fish shop holder has filed a Regular Civil Suit against respondent by No.4/1999 before the Hon'ble Civil Judge (J.D.), Porbandar and has obtained status quo order on 16.1.1999 to continue his fish packing activity at the same place. The said order is annexed hereby as ANNEXURE-'R5'. Hence the matter is sub-judice before the Hon'ble Civil Judge (J.D.), Porbandar and status-quo order is in execution till today therefore, as the binding judicial order is operating against the respondent, the respondent has not been in a position to move against the above said fish shop holder's fish packing activity. Inspite of present petition, the petitioner should have made an application for being impleaded as party defendant of the said civil suit which is pending before the Hon'ble Civil Judge (J.D.), Porbandar but petitioner has not become the party in the said Civil Suit with Porbandar Nagar Palika as an interested party. So on this ground alone the petition is required to be dismissed.

8. I accept the statement of para 9 of petition but in addition of this para, I say that one IPS officer Mrs. Kiran Bedi has filed a writ in Hon'ble Supreme Court by No.26/98 under which Hon'ble Supreme Court has ordered by order

dt.16.10.1998 to the "Central Pollution Control Board" to give its report regarding action to be taken to avoid the pollution of "fish smell". In response of the aforesaid order the Hon'ble Supreme Court, the Central Pollution Board has submitted its first preliminary report before the Hon'ble Supreme Court on 25.1.1999 and final report is yet to come therefore, being a party in above said writ No.26/98 in the Hon'ble Supreme Court, the respondent and all fish business persons will have to follow the final order of the Hon'ble Supreme Court therefore, when the matter is pending before the Hon'ble Supreme Court and the matter is pending before the Hon'ble Civil Judge (J.D.) Porbandar, if the Hon'ble Court passes any directive order against respondent, it may be contradictory order. Under this circumstances nothing remains in the present petition and the present petition is required to be dismissed with cost."

4. When the matter was taken up today for hearing, a photo stat copy of the Supreme Court's order dt.9.4.99 passed in Writ Petition (Civil) No.26/98 i.e. Kiran Bedi v. Union of India and another was produced by the parties before this court and the copy of this order shows that the Supreme Court after considering the affidavit filed on behalf of the State of Gujarat in the above writ petition as was filed by Kiran Bedi, had issued the following directions and the matter was directed to be listed after three months:-

"(i) the area between Manik Chowk and Sardar Vallabh Bhai Patel Road shall be treated as "Walking Plaza" and no vehicular traffic will be allowed on this road, subject to the special permission which may be granted by the S.P. (Traffic) or the Collector of the District for urgent Government work. No hawkers will also be allowed in this area;

(ii) No fish-drying activity will be carried out in and around an area of three Kms. from Kirti Mandir.

(iii) So far as the sewerage system is concerned, the State of Gujarat as also the Municipality of Porbandar shall file an affidavit indicating the progress made in the work/project set out in sub-para (iv) above."

5. It was then given out by the parties that this matter was to come up before the Supreme Court on 16.2.2000 but either of the parties are not in a position

to inform this court as to what proceedings took place before the Supreme Court on 16.2.2000.

6. Be that as it may, I find that the direction given by the Supreme Court at item No.(ii) on 9.4.99 i.e. no fish-drying activity will be carried out in and around an area of three Kms. from Kirti Mandir, substantially takes care of the grievance as has been raised in this petition. It is the say of the Municipality that a Civil Suit as filed by the shop holders against the Municipality is pending being Civil Suit No.4/99 before the Civil Judge (J.D.), Porbandar and that an order of status quo was passed in this Civil Suit on 16.1.99 and, therefore, so long as this order of status quo is in operation, respondent is not in a position to move against the above said shop holder's fish packing activity. The parties are also not in a position to inform this Court as to what happened in the aforesaid Civil Suit after the filing of the aforesaid reply in May 1999. It is clear that the order of status quo was passed on 16.1.99 and the Supreme Court had issued directions on 9.4.99. Either of the parties could have therefore moved the Civil Court with the Copy of the Supreme Court order. But it appears that either of the parties have not taken any step in this regard. Learned counsel for the petitioner herein submits that he is not a party in the Suit. Whether he is in fact a party in the Suit or not, the petitioner could have certainly moved as an intervenor before the Court so as to apprise the Court of Civil Judge (J.D.), at Porbandar of the order passed by the Supreme Court. It goes without saying that the Civil Court has to finally hear on the question of interim relief in accordance with law after taking into consideration the order, as has been passed by the Supreme Court on 9.4.99 or any further order, which may have been passed thereafter at any stage.

7. The respondents would, therefore, act in accordance with the directions as issued by the Supreme Court on 9.4.99 or thereafter,if any. So far as the order of status quo passed by the Civil Judge (J.D.), at Porbandar is concerned, the parties may approach the Court of Civil Judge (J.D.) at Porbandar where the Civil Suit No.4/99 is pending and wherein the order of status quo is said to have been passed on 16.1.99, to modify, vary or set aside that order dt.16.1.99 and decide the question of interim relief in accordance with law, after taking note of the directions, as issued by the Supreme Court on 9.4.99, or thereafter that may be produced by the parties.

The respondent - Municipality shall immediately apply before the Civil Judge (J.D.), at Porbandar for the purpose of passing final order on the question of interim relief in the aforesaid Civil Suit alongwith the copy of this order as also the order passed by the Supreme Court. Should any of the parties approach the Civil Judge (J.D.), at Porbandar with any Application in this regard, the said Court shall pass final orders on the question of interim relief and on the question as to whether the order dt.16.1.99 should continue or not within the period of three weeks from the date such Application is moved alongwith the copy of this order and after due notice to all concerned. This Special Civil Application is decided in the terms, as aforesaid and the rule is made absolute accordingly. No order as to costs.

(M.R.Calla,J)